Statement of

The Honorable Dianne Feinstein

United States Senator
California
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"I am very disappointed that, due to illness, I was unable to attend today's hearing of the Senate Judiciary Committee on the investigation of the Office of Professional Responsibility (OPR) into the Office of Legal Counsel (OLC) memoranda on interrogation of al-Qa'ida detainees.

The Office of Legal Counsel opinions written by former Deputy Assistant Attorney General John Yoo and former Assistant Attorney General Jay Bybee contained deeply flawed legal reasoning that paved the way for the CIA's disastrous use of coercive interrogation techniques.

The Office of Professional Responsibility, the unit within the Department of Justice charged with investigating allegations of misconduct by Department of Justice attorneys that relate to the exercise of their authority to provide legal advice, among other things, found that Messrs. Yoo and Bybee had committed 'professional misconduct' (in Yoo's case, intentionally so) and that their relevant bar associations should consider sanctions, potentially to include disbarment. Although it found no other instances of professional misconduct, the unit also expressed concern about the objectivity and reasonableness of later opinions about interrogation.

The Department of Justice official who resolves challenges to negative OPR findings declined the OPR recommendation to refer Yoo and Bybee to their relevant bar associations, instead determining that Yoo and Bybee 'exercised poor judgment.'

The bottom line is that the August 1, 2002, opinions by these attorneys and the several successor opinions through July 20, 2007, significantly misinterpreted U.S. law and international treaty obligations, to reach pre-ordained conclusions, with grave consequences for our national security. The OLC memos reached egregious conclusions that coercive interrogation techniques did not cause severe physical or mental pain or suffering and that their use did not 'shock the conscience.' They were absolutely wrong.

The techniques that John Yoo and Jay Bybee authorized had been honed by repressive regimes and zealots from the Spanish Inquisition to the Khmer Rouge. They were techniques designed to force false confessions and to punish, not to elicit accurate intelligence. And they were techniques that the U.S. military trained its personnel to resist, precisely because they were gruesome and fell outside the norms established in the Geneva Conventions for appropriately handling prisoners of war.

Even under the Bush Administration, the Department of Justice revoked aspects of John Yoo and Jay Bybee's opinions. Successor heads of OLC, Jack Goldsmith, Dan Levin, and Stephen Bradbury, criticized, replaced or revoked earlier OLC opinions. Attorney General Eric Holder

rescinded the OLC opinions on detention and interrogation which authorized harsh techniques. So it is clear that the legal reasoning they contained could not withstand scrutiny.

The report of the Office of Professional Responsibility outlines the many ways in which John Yoo and Jay Bybee failed to provide acceptable legal reasoning. The OPR review found 'errors, omissions, misstatements, and illogical conclusions' in the Bybee memo and that it 'did not represent thorough, objective, and candid legal advice.'

By all accounts, John Yoo and Jay Bybee were not incapable lawyers. There were reasons why their OLC memos were so poor. We need to understand these reasons and make sure they have been properly addressed. We need to make sure that the many negative consequences of these opinions are examined and remedied. And we need to ensure that Congress is properly informed of opinions of this nature, so that we can properly exercise our responsibility to provide oversight of the Department of Justice and make whatever changes in the law may be necessary as a result of such opinions.

Analysis to Reach a Desired Conclusion. OLC reached conclusions that the use of brutal interrogation techniques and prolonged detention didn't violate the torture statute, the Constitution, the War Crimes statute, or the prohibition on 'outrages upon personal dignity, in particular humiliating and degrading treatment' of the Geneva Conventions. The shortest explanation of how this could happen is because those were the conclusions that the White House, the CIA, and the authors wanted to reach. OPR found that 'the memoranda did not represent thorough, objective, and candid legal advice, but were drafted to provide the client with a legal justification for an interrogation program that included the use of certain EITs [enhanced interrogation techniques].' OPR 'also found evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda to support that result, at the expense of their duty of thoroughness, objectivity, and candor.'

In 2005, Stephen Bradbury memorialized the role of OLC. He wrote that OLC was to provide 'candid, independent, and principled advice - even when that advice may be inconsistent with the desires of policymakers.'

The Office of Legal Counsel during the period of 2002 to 2007 abjectly failed - in some instances, deliberately so--to provide such independent analysis.

Our Nation has paid an enormous price because of the interrogations that were sanctioned by these ill-rendered opinions. They cast shadow and doubt over our ideals and our system of justice. Our enemies have used our practices to recruit more extremists. And our key global partnerships, crucial to winning the war on terror, have been strained.

I intend to discuss with the Attorney General how the OLC is being insulated now from undue pressure by policymakers, so that OLC can truly provide thorough, objective, and candid advice, and not just reach pre-ordained results.

Examining Ongoing Effects of the Repudiated OLC Opinions. While the OLC interrogation and interrogation opinions have been withdrawn and no longer represent the views of OLC, a future

Attorney General might decide to revive them and individuals could seek to use them to come to their own conclusions about the interpretations of these legal restrictions. It's important therefore to have a full debate, both in legal scholarship and continuing study by the Judiciary Committee, of the correct analysis of the Convention Against Torture, the U.S. constitutional provisions that are made applicable by the Convention, Common Article 3 of the Geneva Conventions, and federal torture and war crimes statutes.

Excessive Secrecy. As was the case in the OLC opinions concerning the Terrorist Surveillance Program, the OLC memos on interrogation were not subjected to extensive internal or external review. John Yoo and Jay Bybee did not circulate their opinions to national security law experts who might have recognized the opinions' flaws, did not challenge the CIA's assessments of the need for, and benefits of, the CIA program, and did not conduct their own research into how interrogation techniques were going to be used by the CIA in practice.

While OLC must base its legal analysis on the independent views of its attorneys, it is better able to conduct quality legal reasoning when more viewpoints are considered and facts gathered.

This can, and must, be done even in matters of the highest sensitivity and classification.

Providing OLC Opinions to Congress. Congress is responsible for passing legislation and for overseeing how the Executive Branch implements the law. To fulfill those responsibilities, the Congress must understand how the Executive Branch interprets the law. To do this, Congress must have access to OLC opinions.

OLC opinions are binding on the Executive Branch. If we are to properly exercise our duty to oversee that Branch, it is imperative that we know what rules they are operating under, rules that are, in some cases, enunciated by the OLC. Furthermore, if OLC is providing advice that is contrary to the intent of Congress, or that highlights unintended consequences of legislation that we have enacted, we need to know that so we can take whatever legislative action is necessary in response.

I can speak from personal experience about this, in this very area of the law. I began to voice concern and objection to the CIA's use of coercive interrogation techniques when I was first briefed on them in September, 2006. As the legal opinions were eventually provided and more information was made available, I authored legislation to prohibit the use of these interrogation techniques.

When Senator Whitehouse and I learned that OLC had written opinions arguing, amazingly, that the Foreign Intelligence Surveillance Act (FISA) was not intended to be the exclusive means to govern the use of electronic surveillance, we wrote legislation re-affirming the exclusivity of FISA.

In fact, the large majority of OLC opinions deal with unclassified matters and are made public. However, for those cases where classification or other sensitivities preclude public release, OLC opinions should be made available at least to the appropriate oversight committees of Congress.

I look forward to working with the Attorney General, the Office of Legal Counsel, and colleagues in Congress to address these vital issues."

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